No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Eastern Division

J. F. MARTIN
C. BEN MARTIN
Attorneys for Appellee
Residence: Boise, Idaho

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Eastern Division

J. F. MARTIN
C. BEN MARTIN
Attorneys for Appellee
Residence: Boise, Idaho

INDEX OF SUBJECTS AND POINTS MADE

TABLE OF AUTHORITIES

Cases Cited

RULES OF THE COURT

STATUTES

ENCYCLOPEDIAS AND TEXTS

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

REPLY TO APPELLANT'S BRIEF

The record contains a STATEMENT OF POINTS (R pp. 154-158).

In the Brief of Appellant there is contained a Section captioned QUESTIONS PRESENTED. (pp. 2-4).

At pages 10 to 13 of Brief of Appellant is a section entitled SPECIFICATIONS OF ERRORS.

It is assumed that the intention of appellant

is to rely upon the specifications of errors as elaborating the "Questions Presented."

For that reason, in this reply brief, the answers are directed primarily to the specifications, and by way of summation to the "Questions Presented."

PRELIMINARY OBJECTION TO REVIEW

At the outset, appellee respectfully suggests that there are no questions properly before this court for review. The absence of objections in the record, and the introduction of evidence without objection on both sides, point up the application of Rule 18(d) and Rule 20.

As the rules are understood, it is the duty of the appellant to particularly point out the alleged error upon which she relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found, and in questioning evidence to quote the grounds urged at the trial and the full substance of the evidence admitted or rejected. Without such compliance there is nothing here for review.

Peck vs. Shell Oil Company
142 Fed. (2) 141 (CCA 9);

Maryland Cas. Co. vs. Orchard L. & T. Co.
CCA (9) 240 Fed. 364.

Migeon vs. M. C. RR. Co.
CCA (9) 77 Fed. 249;

Rule 18 (d) Rules of 9th Circuit Court of Appeals;

Rule 20 Rules of 9th Circuit Court of Appeals.

The specifications of error are replied to seriatim as follows:

I.

(a) The language "not affecting the value thereof" in the last part of Finding of Fact IV is supported by the testimony of plaintiff (R 70-71) and the Exhibits 8 and 9 (R 71-72). By the exhibits and the testimony of the witness the question of materiality of damage was for the trial judge, and the finding represents his conclusion upon a question of fact, which this court will not review, there being supporting evidence in the record.

Occidental Life Ins. Co. vs. Thomas 107 Fed. (2) 876.

(b) The language in Finding of Fact V indicating that appellant was "fully conversant" with prices and values of trailer houses is a mere summation, amounting almost to a paraphrase of the testimony of appellant (R 65-66) on cross-examination.

(c) The complaint against Finding of Fact VI, in which it is found that "the plaintiff knew or by exercise of any degree of care or caution should have known that neither the said Roberts nor the said Pauls had any right, title or interest in or to

said trailer house" etc. is without merit, both on the facts and the law, for the following reasons:

1. It is the settled law of Idaho that one who purchases property must at his peril ascertain the title and right of the vendor to sell:

Klam vs. Koppel, 63 Idaho 171, 118 Pac. (2) 729;

Fed. Land Bank vs. McCloud, 52 Ida. 694, 703 20 P. (2) 201.

2. It is shown by the evidence that the conveyance taken by appellant was signed by Roberts and Pauls as grantors, neither as agents nor otherwise than in their own right, (Bill of Sale, Exhibit 4) payment being made directly to them (R 56) by check cashed by them, one of the payees, Pauls, being wholly unknown to the trailer manufacturer (R 121, 137). It is perhaps significant that Pauls' signature appears first as a grantor in the bill of sale.

The statute of the State of Idaho covering such sales is Section 64-207, Idaho Code, which provides, in relevant part:

"1. Subject to the provisions of this law, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The Supreme Court of Idaho applied the

foregoing rule of law in Federal Land Bank vs. McCloud, 52 Ida. 694, 20 Pac. (2) 201, saying:

"The McClouds attempted to sell property in which they had no title. The principle is well settled that a seller of personal property can convey no greater title than he had, and it makes no difference that the purchaser has no notice and is ignorant of the existence of other parties in interest (7 R.C.L. 886; Klundt vs. Bachtold, 110 Wash. 594, 188 Pac. 924; Tuttle vs. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am.St. 652; Trustees vs. Williams, 102 Wis. 223, 75 N. W. 954, 69 Am. St. 912; Waterford Irr. Dist. vs. Turlock Irr. Dist., 50 Cal. App. 213, 194 Pac. 757). One who buys property must, at his peril, ascertain the ownership; and if he buys of one having no authority to sell, his taking possession in denial of the owner's rights is a conversion."

3. Where the transaction is had in the names of the agents, not in the name of the principal, the doctrine of apparent authority is not applicable, and the transaction is void.

Blackwell vs. Kercheval
29 Idaho 473, 160 Pac. 741;
2 Am. Jur. 200, #248; 2 Am. Jur. 80, #98.

4. Upon the face of the evidence, the finding of the court is amply supported, it being clear that (a) the purchase was made from Roberts and Pauls in their own names (Exhibit 14); (b) the purchase was made at a price which appellant knew to be less than half the minimum value of the trailer (R 66); (c) appellant admitted she knew the trailer was merely in transit and being hauled to

a purchaser in Boise (R 60); (d) appellant had in mind inquiry as to authority of Roberts and Pauls to sell, stating (R 56):

"I examined the trailer and I asked these two gentlemen if they had authority to sell it"

and (e) making it clear that she was dealing with them, and them alone, not with the owner-manufacturer, with whom she made no contact (R 56 72). The only basis for belief that Roberts and Pauls had authority to sell was in their statement to that effect, which has been so frequently held worthless as any proof of authority as to be null as a matter of axiom.

Chamberlain vs. The Amalgamated Sugar Company 42 Idaho 604; 247 Pac. 12;

Cupples vs. Stanfield
35 Idaho 466; 207 Pac. 326;

Madill vs. Spokane Cattle Loan Co.
39 Ida. 754, 758; 230 Pac. 45;

Cox vs. Crane Creek Sheep Co.
34 Ida. 327; 200 Pac. 678.

5. It is thus made eminently clear that appellant bought from men who neither had title nor authority to sell, and was on notice, and made no inquiry, and acquired no interest in the house trailer whatever by such a pact.

6. Under these circumstances the charge that appellant was "unequivocally an innocent purchaser for value under the laws of the State

of Idaho" falls in a hopeless mire. As is said in

46 Am. Jur. 624, #460,

> "So long as the possession of goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief." (Underlining supplied)

Of such a situation, nullifying the notion of innocent purchase, the Supreme Court of Arizona said, in

Brutinel vs. Nygren,
17 Arizona 491, 154 Pac. 1042;
L. R. A. 1918 F, 713:

> "The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing, suggests the duty to stop, look and listen; and if he would bind the principal, is bound to ascertain not only the fact of agency, but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises."

Otherwise the buyer is by no means innocent, indeed is not even a purchaser. Contrary to the position of appellant, the record makes it manifestly clear that she saw an opportunity to buy a Six Thousand Dollar trailer house for Two Thousand Dollars and siezed the opportunity without asking questions which would inevitably have stopped the deal. This is not "innocent purchase."

(d) Specification of Error I (d)

Finding of Fact VIII is without merit, in that it ignores the duty of disclosure on the part of an applicant for insurance. It is shown in the record (R 60) that appellant undertook to state the circumstances of her supposed acquisition of the title to the trailer house. It is the rule in such cases, differing from the cases involving "no evidence of any refusal by appellant to answer any inquiry", that

> "if the insured undertakes to state all the circumstances affecting the risk, a full and fair statement of all such circumstances is required."
>
> 29 Am. Jur. 438 #540.

In her testimony, appellant undertook to detail her purchase, omitting any mention of the crux of this case, i.e., that the men she bought from had no right to sell to her. So far as her testimony shows, she carefully omitted mention of the owner-manufacturer in applying for insurance (R 60). The facts were not disclosed, the burden of disclosing the same existed, and the finding conforms both with the evidence and the law.

(e) The attack on Finding of Fact IX, objecting to the finding that at the time plaintiff applied for and procured the insurance policy she had no insurable interested in the trailer house, is asserted in the brief (p. 15) to be "the essential question in this litigation." We therefore examine it in especial detail here:

It is an ancient and well established rule that

"Where no title or possibility of title has passed there is no insurable interest"

Note 84, 26. C. J. 32.

This is but a short, pointed statement of the rule commonly recognized, that

"a person has no insurable interest in a thing where his only right arises under a contract which is void or unenforceable either at law or in equity."

Hessen vs. Iowa Auto. Mut. Ins. Co.
195 Iowa 141, 190 N.W. 150,
30 A.L.R. 657.

In the above case, supposed title originated in theft, and the purchaser bought in good faith, not knowing of the theft. Held, that there was no insurable interest.

We have pointed out under 6 supra that

"So long as the possession of goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief." (46 Am. Jur. 624 #460). (Underlining supplied)

Indeed, it appears that a mere theft by a stranger, is less morally reprehensible than the case of the transportation employee who is trusted with property and sells it in his own name for his own benefit and leaves for parts unknown. As far back as ancient Biblical times there has been a special category of reproach embodied in the words "mine own familiar friend hath lifted up the heel against me." Appellant

certainly acquired no more from Pauls, the interloper, and Roberts, the breaker of trust, than from a common thief, to-wit, absolutely nothing; and that is not insurable.

Giles vs. Citizens Ins. Co.
32 Ga. App. 207, 122 S. E. 890.

It is the general rule, stated in

29 Am. Jur. 289 (cases in Note 3)

that an insurable interest is necessary to the validity of an insurance contract, whatever the subject matter of the policy, whether upon property or life, and that no insurable interest existing, the contract is void.

The Idaho Supreme Court has made it clear, in

Mountain States Impl. Co. vs. Arave
50 Ida. 624, 2 Pac. (2) 314;

Dumas vs. Bryan
35 Ida. 557, 207 Pac. 720

that what is void in law is of no effect whatever, being just the same thing as a blank page, establishing no rights and imposing no duties. An excellent illustration of the force given to this rule is found in

Evans vs. City of American Falls
52 Ida. 7, 23, 11 Pac. (2) 363.

Against a claim of title resulting from a judgment and execution sale, the judgment being void, the court said:

"An execution issued without a judgment or decree to support it is void and confers no authority on the officer to whom it is directed, and if there is no judgment as the basis for the

> execution the purchaser acquires no title. The judgment is the sole foundation of the official power to sell and convey property, and if there is no judgment he is without power to sell, and all his acts under an execution issued in such case are without authority and void." (Underlining supplied)

A fortiori, where the pretended power to sell is couched in embezzlement, any contract of sale is void. The position taken in the brief that recording a bill of sale, void in its entirety, is some evidence of insurable title, falls by the wayside, just as the sale on execution levy without a valid judgment fell.

Upon the same basis, the Kentucky court, in

> Niagara Fire Insurance Company vs Layne
> 162 Ky. 665; 172 S.W. 1090

clearly and rightly held that a purchaser from one who had no authority to sell acquires no insurable interest.

The Idaho Statute defining insurable interest is quoted at p. 15 of appellant's brief (Section 41-201(14) Idaho Code as amended). This statutory definition is declarative of the well established general law of the subject (29 Am. Jur. 293 #322) and in no way in conflict with the rules above set forth.

Examination of the cases cited by appellant discloses no precedent for the anomalous position that a buyer from the equivalent of a thief thereby acquires an insurable interest. Briefly reviewing them it is seen:

At page 17, the reference is to record title and

equitable title, unquestioned, substantial property rights, held insurable. Not in point here.

At pages 18 and 19 the reference (as shown at the end of the quotation on page 19) is to "defeasible, contingent, inchoate or partial interests." Not in point here.

Examination of the cases cited on page 20 discloses that they relate to valid contracts, under which a definite right of property is legally existent, although neither involving title, lien or possession. That such contracts give rise to insurable interests is conceded, but the cases are not in point here.

At page 21 the references are to contingency interests, bailments or trusts. Nothing of the sort is involved here.

At the bottom of page 21 and top of page 22 of appellant's brief occurs an abstract statement which appears to go far beyond anything recognized in Idaho law in defining insurable interests. The definition is obscure because of the use of the word "interest" in the definition itself. If it is actually intended by appellant to say that anyone having any concern for the safety of an object has an insurable interest in it, then the cases cited do not support the rule as so stated. Taken literally, and at its face, a rule so stated would render the courtroom of this court insurable in the names of the litigants here present, all of them being concerned for its safety.

At page 22 a reference is made to "qualified interests." Examination of the cases cited discloses that the interests involved were subsisting rights, substantial, and not by any means void.

At the bottom of the same page reference is made to insurability of a "right of possession." Appellant, occupying the position of a joing tortfeasor (Klam vs. Koppel, 63 Ida. 171; 118 Pac. (2) 729) had no right of possession. The point, and the cases cited, are irrelevant.

At page 23, the reference is to rights of a bailee. No such issue is present here.

The most diligent review of the cases cited by appellant fails to disclose a parallel to the present situation, and we are forced back to the initial premise that one who has no more right or title than a thief cannot pass any more right or title than a thief, and his attempt to do so produces no insurable interest (Federal Land Bank vs. McCloud, 52 Ida. 694; 20 Pac. (2) 201; Hessen vs. Iowa Auto. Mut. Ins. Co., 195 Ia. 141; 190 N.W. 150; 30 A.L.R. 657).

(f) The record shows that the premium paid by appellant was tendered back to appellant as soon as the facts were ascertained, and the tender is still in force (R 20, 42) and so found by the trial judge.

(g) Specification of Error I (g) attacks Finding of Fact XI on the point that appellant had no insurable

interest. This has been covered above in part, and is more fully covered in this brief hereafter.

II.

The second Specification of Error consists of three parts (a) relating to apparent authority of Joseph Roberts, (b) relating to insurable interest, and an unlettered paragraph charging error in Conclusion of Law IV, V and VI "for the reason that the Trial Court misconceived and misapplied Idaho law."

Subdivision (a) is answered as follows:

> "Apparent, or, as it is also called, ostensible authority, on the other hand, may be defined as that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing." (Underlining supplied)
>
> 2 Am. Jur. 69, 82.
> Restatement of Agency #8.

The manufacturer-owner of the trailer house held out nothing by way of representation to appellant relating to sale or passing of any right whatever in the same. And the other man, Pauls, as an interloper merely joined in a conversion.

Subdivision (b) is answered as follows:

The Conclusions of Law attacked (II and III) follow the Findings of Fact IX and XI, the attacks on which are disposed of under I (e) and (g), supra.

The unlettered paragraph attacking Conclusions of Law IV, V and VI, which recite (IV) that appellee

has no liability to appellant, (V) that appellant is not entitled to recover, and (VI) that appellee is entitled to judgment against appellant and costs, merely recites that the Trial Court misconceived and misapplied Idaho law. The whole of this brief is pointed to a contrary position, and without a more definite statement in the specification as to wherein the trial court so misconceived and misapplied the law, the paragraph cannot be otherwise more fully answered.

III.

The third Specification of Error asserts that the matter of the way by which any "insurable interest" in appellant was acquired was irrelevant hence the trial court erred.

The appellant introduced the initial evidence on this subject on her own direct examination (R 56). The objection, if it was ever proper, which is denied, was conclusively waived by introduction of the same evidence on the part of appellant.

Naccarato vs. Village of Priest River 68 Ida. 368, 195 Pac. (2) 370;

53 Am. Jur. 129 #144;

Chicago & E. I. R. Co. vs. Collins Produce Co. 249 U.S. 186; 63 L. ed. 552; 39 S.Ct. 189;

3 Am. Jur. 430.

IV.

Specification IV alleges insufficiency of the evidence to support the affirmative defenses of appellee and the judgment, and as a conclusion states that the appellee failed to void the insurance contract sued upon. The specification does not indicate wherein the proof falls short, and requires this court to search the record, which it is not bound to do.

Nevertheless, the proof shows the defenses sustained as follows:

1. Appellant, buying from Pauls and Roberts, who were completely without ownership and authority to sell, acquired nothing insurable (R 56, 68, 70, 72, 75, 76; Exhibit 4 and cases cited supra herein).

V.

Specification V avers that the evidence discloses, without contradiction, the appellant entitled to recover $4,627.50 and attorneys' fees. Again: The contradicting evidence is clear: Appellant bought for $2000.00, less than half of what she now claims, a trailer house she knew to be worth at least Five Thousand Dollars (R 56, 68) under such circumstances that she was on complete notice, yet without any effort to communicate with the owner of the vehicle (See I (c) supra).

VI., VII, and VIII.

The final three specifications of error may be disposed of together, since all three involve the same assertion, that the law of Idaho is against the judgment, and consequently that the appellant is deprived of her freedom and right to contract. Fundamentally the objections run to the definition of an insurable interest and the question of title of the appellant. Reading the specifications appellant's Statement of Points (R 154-157 inc.) and the Questions Presented (Brief pp. 2-4) it is clear that appellant stands on two propositions, (1) that she acquired an insurable interest by the Bill of Sale procedure which she adopted (R56-57) in lieu of the statutory title procedure, which she admits she did not invoke (R 72, 87, 89, 122-123) and (2) that the statutory procedure is not applicable to trailer house title, or at least not applicable in this instance.

Section 49-401 of the Idaho Code provides as follows:

> "49-401. Definitions.--The following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:
>
> a. 'Vehicle.' Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon

stationary rails or tracks.

b. 'Motor Vehicle.' Every vehicle, as herein defined which is self-propelled and every vehicle designated to be drawn upon a public highway behind and in conjunction with a self-propelled motor vehicle, provided there shall be excluded herefrom every such vehicle so drawn, excepting house trailers, whose unladen weight is less than two thousand pounds. * * *.
(Underlining supplied).

Section 49-401 (b) defining motor vehicles, includes house trailers within its terms, regardless of weight, excluding from its terms only non-house trailers weighing less than two thousand pounds. The construction placed upon this section in appellant's brief is strained, creating an ambiguity by ignoring the punctuation placed in the Section by the Legislature. When the section is read as in pari materia with the other sections relating to registration (49-101ee, 49-107, 49-155), title (49-403 to 49-416) equipment (49-839; 49-845) and operation (49-701 seq.) there can be no doubt at all that title to house trailers must be acquired and transferred in conformity with the motor vehicle code.

The Idaho cases cited by appellant do not sustain appellant's position. This is demonstrated as follows:

In Lux vs. Lockridge, 65 Ida. 639; 150 P. (2) 127, the Supreme Court did not decide the question whether or not failure to procure title certificate as required by statute renders a sale void. Witness the

words of the same court in Dissault vs. Evans, 74 Ida. 295 (299); 261 P. (2) 822:

> "That case expressly did not decide whether the failure to pass the certificate of title as required by the statute made the sale void."

The Dissault case supra, itself, relied upon heavily in the appellant's brief, is completely wide of the point. In it, the court said

> "The decision here is not based strictly upon estoppel, but on the proposition that appellants while insisting upon a strict adherence to the necessity of having a title certificate, themselves never had a title certificate which complied with the law" * *.

On its facts, the Dissault case bears no remote resemblance to the present issues. In that case Pocatello Auto Dealers Association bought a car from Motor Center. Ed Barrett was president of the Association, and Motor Center was his own assumed business name. He took title in the usual manner in his own name and endorsed the certificate on the reverse for transfer, as did the finance company which was involved. Then Barrett, acting for the association, which had retaken the car from Pocatello High School, to which it had been loaned, sold the car to Evans. The Supreme Court said of this

> "There is no dispute in the record the automobile was voluntarily and intentionally turned over to Barrett for the purpose of having it sold; there is no contention that the price paid by respondent was inadequate", (Underlining

supplied),
and Evans paid out the purchase price on that sale in full, to Barrett. Barrett failed to pay the money over to his employer, the automobile association. In the suit in replevin by the automobile association, the Supreme Court inevitably held that Barrett was its agent for the purpose of sale, he had received payment in full, and the association, having never procured a title for itself was hardly in position to complain of Evans, who had left the title matter up to Barrett and the second finance company.

Comparing the situation there with that in the present case, the basis for the ruling of the trial court, which in effect distinguishes the Dissault case, is manifest. Summarized, it is this:

Roberts was a transportation agent only; Pauls was an interloper; neither had any authority to sell, nor any title evidence; enroute in the course of a delivery, Roberts, with Pauls conniving, having neither ownership nor muniments of title, stopped the trailer in transitu, and purported to sell it as the property of Roberts and Pauls, for less than half its value, to a purchaser who, being warned of defective title by her attorney, who told her the bill of sale she got was no better than the man who gave it (R 89) and asked her if she knew them and received a negative answer (R 89), yet made no contact with the true owner and procured no Idaho title as required

by law. Nor could she have done so with the instrument she received. The Dissault case is the converse of what it is viewed by appellant to be, and merely holds, recognizing the full force of the statute, which is applicable here, that under the peculiar facts in that case, the plaintiffs there could not maintain an action in replevin.

The cases from other jurisdictions are of no help here. It was pointed out in the Dissault case by the Supreme Court that it is futile to find the solution to our statutory problem in the decisions in other states, which are hopelessly in confusion.

There is some assistance in the case of Lux vs. Lockridge, above cited. The Supreme Court did there hold (65 Ida. loc. cit. 643)

> "We are impressed with the cogency of the reasoning in Swartz vs. White, 80 Utah 150, 13 Pac. (2) 643, to the effect that a purchaser not receiving the certificate of title is not a bona fide purchaser for value" ***.

It is also to be noted that the position taken by the appellant here is that which was taken by Justice Ailshie in his dissenting opinion in Lux vs. Lockridge which has never, contrary to the assertion in appellant's brief, been modified.

In the Dissault case the Supreme Court stated that it was "impressed" with the decision in Al's Auto Sales vs. Moskowitz, 203 Okl. 611, 224 Pac. (2) 588, where a certificate of title statute similar to ours was

relied upon by the assertedly true owner as herein. In the quotation from that case, the Supreme Court noted language which affords a criterion for decision in this case. It is this:

> "There was nothing recorded or otherwise to bring to the attention of defendant Moskowitz (respondent Evans) the true ownership of the automobile. He had no notice, actual or constructive."

Applying that test to the facts shown in the record it is at once seen that appellant was fully warned, put on notice, and yet deliberately proceeded in the teeth of the statute. The evidence so showing is as follows:

1. At page 56 of the transcript appellant stated: "I examined the trailer and I asked these two gentlemen if they had the authority to sell it." "Authority to sell it" implies and clearly admits that appellant knew that the men she interviewed were not owners, but claiming to have "authority to sell."

2. Exhibit 4, received on appellant's identification, conflicts, showing Roberts and Pauls as vendors (R57).

3. At page 60 of the transcript appellant testified "I explained to him that it (the trailer house) was going through with a convoy and these two gentlemen had wrecked the trailer and offered to sell it to me because it would be rejected when they got to Boise where they were taking it and they would

have to trail it back to Texas. And they gave me a good - what I thought was a good buy on it - and so I had purchased it" * * *. (Underlining supplied).

This testimony is subject to no construction except that the true owner was neither Roberts nor Pauls. It also makes clear that Roberts and Pauls had no power of disposition. Otherwise there would be no reason for saying that the trailer would have to be trailed "back to Texas". If Roberts and Pauls had power to sell at American Falls, they had power to sell at Boise. Moreover, this testimony clearly admits that appellant knew that there was a purchaser at Boise to whom the trailer house was being transported. Otherwise there is no meaning in the words "it would be rejected when they got to Boise."

4. Actually, appellant had direct knowledge concerning the Boise purchaser. At R 67-68 appellant testified: "I imagine that it would have cost that much had I gotten it at a trailer court, but they had a Bill of Sale - no - it wasn't a Bill of Sale, they had a paper that they were to deliver it for four thousand at Boise". (Underlining supplied) Appellant is thereby most clearly shown to have known that the function of Roberts and Pauls was that of delivery agents, not vendors. "They were to deliver it", and she saw the paper (Exhibit 6, R 68) in which the true owner is designated, and heard the men who sold to her talk about the company. This is manifest from

appellant's statement (R 69):

> "They told the lawyer that they were in authority to act for the company."

Further, appellant added:

> "Well, they said they had damaged it and they would sell it at a bargain rather than take it into Boise and it would be rejected and they would have to take it back to Texas and they would sell it at that price rather than trail it clear back to Texas."

5. In the record (R 73) appellant testified as follows:

> "Q. Now isn't it a fact that you, in your deposition, you stated they told you that they would send you a Certificate of Title?
> A. They told Mr. Loofborrow that they would."

This is the clearest possible evidence that appellant went into the details of title, bringing her into the category of one on notice. Whereas, in the Dissault case (the quotation from Al's Sales vs. Moskowitz, supra) "there was nothing recorded or otherwise to bring to the attention of defendant the true ownership of the automobile" the exact opposite is shown to be true here.

On the other side of the evidence, it is shown without dispute, by the witnesses for the appellee that no certificate of origin ever issued to appellant (R 124), she was totally unknown to the true owner (R 131) and never had any communication with the owner (R 131), sales by drivers were never permitted, their function being that of delivery only (R 129), Roberts (who was

the one who actually made the representation that he had authority to sell (R 73) was not a salesman for the company (R 129), he abandoned the truck which hauled the trailer, at Garden City, Idaho, where it was found by police (R 130) and a warrant is out for his arrest (R 130-131) on a complaint charging him with embezzlement of the trailer (R 131). Specifically, it is established by the witness Franks (R 131) that Roberts had no authority to sell to appellant:

> "Q. Did Joseph R. Roberts have any authority to sell trailer No. 6995, identified as Defendant's Exhibit 1, (now known as plaintiff's exhibit No. 6) to Beatrice Nelson?
> A. No, his instruction was to deliver it to Aetna Trailer Sales at the ir Boise, Idaho, location.
> Q. Did Joseph R. Roberts ever have authority to deliver that trailer to Beatrice Nelson?
> A. No, he did not."

It is further established that the owner never transferred titles except by the issuance of certificates of origin (R 132-133). In all these matters the testimony of Franks is corroborated by that of Riley. As to Pauls, he was unknown to the owner (R 137).

It is of importance to note that in the practice of the company, a damaged trailer would not "have to be trailed clear back to Texas" as stated by appellant, but the matter of the damage is adjusted by interoffice sheets (R 138-139) a fact established without objection (R 139).

SUMMARY

Turning, in conclusion to the "Questions Presented" (Brief of Appellant p. 2 ff.) answers are returned as follows:

1. The District Court not only could, but was obliged upon the evidence to hold that Beatrice Nelson was not a bona fide purchaser for value, she being on full notice and buying at a "hot" merchandise price, if use of the vernacular may be allowed.

2. The trial court correctly concluded that in the State of Idaho a certificate of title is a condition precedent to acquiring an insurable interest in a trailer home, it being recognized that there are some circumstances, not involved here, such as estoppel on the part of a vendor, which constitute exceptions. No such circumstances appear here.

3. The trial court was obliged to conclude, and could not reasonably have found otherwise that appellant took no more title from Joseph Roberts and Albert Pauls than they had, which was none.

4. The court could not have concluded otherwise than that Beatrice Nelson acquired no insurable interest, buying from persons without ownership, while on notice. As to the $2000.00 she paid, she was simply defrauded by Roberts and Pauls, and is in no better position with respect to an insurable interest from being so defrauded than she would have been by direct theft of the sum from her purse.

5. There was no error in the judgment, which is fully supported in the evidence.

6. The findings and conclusions were proper, as above shown in detail.

7. The question of relevance of the evidence received is not before this court, being waived by failure to object, waived by introduction of evidence on the same lines, as above shown, and waived by failure to conform on the appeal with Rules 18 (d) and 20.

8. The trial court correctly upheld the defense that a person buying from such as Roberts and Pauls acquired no insurable interest.

In conclusion, appellee desires to call attention to the fact that appellant has, repeatedly, throughout her brief, referred to the position of appellee as one which would create a "windfall" to appellee. How the appellant comes to this conclusion is beyond the comprehension of appellee. The appellee has tendered to the appellant the gross amount of the premium paid. Had appellee not done so, the situation might be different though, of course, such a position would be untenable.

Further, should the appellant prevail in her contention, it would establish a situation in Idaho which would legally condone a thief or embezzler, either acting in consort with an accomplice or independently, in selling stolen or embezzled personal property to

anyone, particularly to an accomplice, who could then insure such personal property and deliberately cause its destruction and then collect on the policy of insurance. If the vernacular "fence" may be used for a person who deals in the disposition of stolen goods, the position of the appellant would be - to use the wording of the appellant - a "windfall" to those who steal or embezzle and Idaho would become their "Happy Hunting Ground."

Respectfully submitted,

J. F. MARTIN
C. BEN MARTIN

By C. Ben Martin
Attorneys for Appellee
Residence: Boise, Idaho